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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. STEVEN DWAYNE CHEATHAM, Defendant and Appellant.	B283821 (Los Angeles County Super. Ct. No. TA075519)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jack W. Morgan, Judge. Affirmed and remanded with directions.

Maggie Shrout, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Steven Dwayne Cheatham of shooting at an occupied motor vehicle (Pen. Code, § 246),[1] assault with a semiautomatic firearm (§ 245, subd. (a)), and possession of a firearm by a felon (§ 12021, subd. (a)).[2] The jury also found that defendant personally used a firearm (§ 12022.5) and had served a prior prison term (§ 667.5, subd. (b)). Defendant was sentenced to a total state prison term of 20 years eight months, consisting of the high term of nine years on the assault conviction, a consecutive eight-month term on the possession conviction, plus a 10-year term on the firearm enhancement and a one-year term on the prior prison term enhancement. The trial court also imposed a concurrent seven-year term for shooting at an occupied motor vehicle.

Defendant appeals.[3] He contends that the trial court erred by (1) admitting evidence of his prior act of domestic violence, and (2) admitting evidence of his gang membership. He further argues that the matter must be remanded to allow the trial court to exercise its discretion whether to strike or dismiss the firearm enhancement.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The jury acquitted defendant of an attempted murder charge (§ 664/187, subd. (a)).

[3] Defendant was sentenced on April 20, 2006. On May 23, 2006, trial counsel filed a motion for appointed counsel on defendant's behalf, as opposed to filing a notice of appeal. No record on appeal was prepared and no counsel was appointed. On July 19, 2017, this court granted defendant's application for relief from default in filing a timely notice of appeal.

We agree with defendant that the matter must be remanded for resentencing. In all other respects, we affirm the judgment.

FACTUAL BACKGROUND

The People's Evidence

A. Defendant fired shots at his girlfriend's vehicle following an argument

Nakisha Blackmon (Blackmon) and defendant began their romantic relationship in 1999. Blackmon ended the relationship after the following incident: On the evening of July 3, 2004, Blackmon drove with defendant to get something to eat. During the drive, Blackmon noticed a gun on defendant's lap as he sat in the passenger seat. She previously told defendant never to bring a gun around her. An argument ensued after Blackmon asked defendant to take the gun back. Defendant said that it was not a big issue and that she should not be "tripping about the gun." He had her drop him off at the Douglas apartments. Blackmon immediately drove defendant to that location. When they arrived, defendant got out of the car, slammed the door, and said, "'I'm going to kill you, bitch.'" Defendant then walked behind the vehicle. Within seconds of Blackmon driving away, defendant fired several shots at the vehicle, one of which shattered the back windshield. Blackmon ducked down when she heard the shots. Afterwards, she looked behind and saw defendant running into the parking lot of the apartment complex.

Blackmon drove away and called defendant moments later. She told him that she was going to call the police. He replied that he did not "give a f***" what she did. Blackmon then called 911 and reported the incident. As she spoke to the operator, Blackmon expressed concern about where she would meet the police because defendant was "very popular in his neighborhood" and had a lot of friends and family members.

Los Angeles County Sheriff's Deputy Rafael Rufino and his partner met with Blackmon. She appeared nervous and afraid. She stood next to her car, which had a broken back windshield and a dent on the top portion. The dent was consistent with a bullet mark. As Blackmon spoke to Deputy Rufino, defendant called her and said, "'Come pick me up, bitch, or I'm going to kill you.'" Defendant admitted that he shot at her, but claimed that it was only a warning shot in the air. Defendant also called Blackmon the following morning and admitted that he only shot at her once.

B. Defendant physically beat Blackmon in a prior incident of domestic violence

On May 15, 2001, defendant's brother had a social gathering at his house in Compton. Blackmon and defendant attended. Defendant was intoxicated and began to argue with Blackmon. He acted with "attitude" and "made a negative comment" to her. After Blackmon responded that defendant "must be high or something," defendant punched her in the face. A fight ensued, during which defendant repeatedly punched Blackmon as she tried to fend off the attack. Defendant smashed Blackmon's head into a glass coffee table, which caused it to break. Blackmon was no longer able to fight back. Defendant continued the attack, dragging Blackmon throughout the house. During the altercation, defendant's brother told defendant to stop; he eventually called the police. Defendant finally stopped and left.

Blackmon went to the hospital where she was treated for her injuries, which included a laceration on her head that required 12 stitches, a broken nose, and a fractured skull.

When police interviewed her at the hospital, she refused to identify defendant as the culprit. She testified that the reason she did not do so at the time was because she was afraid that the

police would not be able to protect her; defendant had friends and family members who took matters into their own hands.

Defense Evidence

A. Defendant claimed that a third party fired the shots

Defendant testified on his own behalf. He denied ever displaying a gun on his lap or shooting at Blackmon's vehicle. He claimed that the argument started when he placed his phone on his lap and Blackmon thought it was a gun. Blackmon had accused him of bringing a gun in her vehicle, while defendant insisted that he had not done so. Defendant then asked her to drop him off at the Douglas apartments.

Once there, defendant got out of the vehicle and noticed "Mexicans with hoods" approaching. He tried to convince Blackmon to park inside the apartment complex, but she refused. The group suddenly fired shots, and defendant immediately ran inside the apartment complex. When Blackmon called him shortly thereafter, he asked her to come back to the location so they could talk. Blackmon replied, "'F*** you[.] You're going to jail. I hope you die.'"

Defendant called back later and again insisted that she return so they could talk about it. Defendant denied telling her he shot a gun.

B. Blackmon was the aggressor in their relationship

Defendant claimed that Blackmon was the aggressor in their relationship. Regarding the May 2001 incident, defendant testified that Blackmon became belligerent after drinking. Defendant told her that he wanted to leave and visit his mother. Blackmon got upset and did not want him to leave. When defendant tried to walk away, she slapped him. Defendant grabbed her. They wrestled each other, lost their balance, and fell on the coffee table where Blackmon hit her head. Blackmon

jumped back up and tried to swing at defendant. Others at the gathering separated them, and defendant subsequently left.

Defendant claimed that his relationship with Blackmon involved a lot of fighting. In the past, Blackmon broke defendant's nose, gave him a black eye, pulled his hair, and tried to run him over with her vehicle.

Tonya Dunbar (Dunbar), who had known defendant since childhood, testified that she was at the May 2001 gathering. According to Dunbar, Blackmon had been drinking all day and slapped defendant after an argument. Defendant restrained her. The couple lost their balance and fell on the coffee table. When police arrived, Dunbar witnessed Blackmon telling them that she did not want to press charges. Dunbar also denied that the photographs depicted Blackmon's injuries from that incident. Rather, she claimed that Blackmon suffered those injuries in a traffic accident a couple of months earlier.[4]

Dr. Terence Sean McGee testified and confirmed Blackmon's medical report, showing that she had been drinking on May 15, 2001.

DISCUSSION

I. The trial court properly admitted evidence of defendant's prior act of domestic violence

Defendant contends that the trial court erred by admitting evidence of the May 2001 prior incident of domestic violence because it was unduly prejudicial.

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[4] On rebuttal, the prosecution introduced evidence from Los Angeles County Sheriff's Deputy Diane Gutierrez. Deputy Gutierrez never saw Dunbar at the gathering on May 15, 2001. Deputy Gutierrez also testified that she took photographs depicting Blackmon's injuries the same day.

A. Relevant proceedings

During a pretrial hearing, the prosecutor sought to introduce evidence of the May 2001 domestic violence incident. The prosecutor argued that the evidence showed defendant's propensity to commit domestic violence (Evid. Code, § 1109, subd. (a)(1)) and his intent in committing the current offenses (Evid. Code, § 1101, subd. (b)). The trial court agreed and admitted the prior incident. The trial court also found that the prior incident did not warrant exclusion under Evidence Code section 352 since domestic violence was the basis of both the prior and current incidents, and evidence regarding the prior incident would not necessitate undue consumption of time.

At trial, Blackmon discussed the May 2001 incident. Deputy Gutierrez testified about her interactions with Blackmon after she responded to the scene, which included taking photographs of Blackmon's injuries. Dr. McGee confirmed Blackmon's medical report. And Dunbar testified about what she had observed during the incident.

In closing argument, the prosecutor discussed how domestic violence victims often remain with their abusers and asked the jury to focus on why defendant continued to victimize Blackmon. The prosecutor added: "That is why you're here. The fact he committed this crime back in 2001 and got away with it is now the past. We're here to talk about what he did on July the 3rd, 2004." Later, the prosecutor argued that the evidence of the May 2001 incident could be considered by the jury "to determine not only that [defendant is] an abuser in a domestic violence situation but what his intent may have been on the incident in July." The prosecutor emphasized: "Is this someone who would intend to kill his victim? Well, look at his victim from a few years before. Broken skull, fractured nose, cut all up around the face, nose, forehead, eyes, hair weave pulled out into pieces and

thrown on the floor. That is what he did. That prior assault is significant evidence for you to consider."

The jury also heard the trial court's instructions. As is relevant to this issue, the jury was told not to consider evidence of defendant's previous crime "to prove [that he] is a person of bad character or that he has a disposition to commit crimes." Rather, the evidence had to be considered to evaluate defendant's intent. The trial court also told the jury how to evaluate whether the May 2001 incident constituted a domestic violence offense and what purpose it could be used for if it made such a finding:

"If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit other offenses involving domestic violence. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which he is accused.

"However, if you find by a preponderance of the evidence that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged offenses. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime."

B. Relevant law

To be admissible, evidence must be relevant. (Evid. Code, § 350.) To be relevant, the evidence must have "a tendency in reason to prove [or disprove] a disputed fact of consequence to the case." (*People v. Kraft* (2000) 23 Cal.4th 978, 1034; Evid. Code, § 210.) A determination of relevant evidence includes whether

the evidence tends, "'"'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive."'"' (*People v. Wilson* (2006) 38 Cal.4th 1237, 1245.)

Evidence of uncharged criminal acts is ordinarily inadmissible to show a defendant's disposition to commit such acts. (Evid. Code, § 1101.) In domestic violence cases, however, Evidence Code section 1109 creates an exception to Evidence Code section 1101's prohibition against propensity evidence. "Under Evidence Code section 1109, evidence of a prior act of domestic violence is admissible to prove the defendant had a propensity to commit domestic violence when the defendant is charged with an offense involving domestic violence," subject to exclusion by Evidence Code section 352. (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1114; see also Evid. Code, § 1109, subd. (a); *People v. Falsetta* (1999) 21 Cal.4th 903, 917; *People v. Johnson* (2000) 77 Cal.App.4th 410, 419–420.)

Under Evidence Code section 352, a trial court "may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Evidence is more prejudicial than probative only when "'it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome." [Citation.]' [Citation.]" (*People v. Jablonski* (2006) 37 Cal.4th 774, 805.) Prejudice in the context of Evidence Code section 352 "'applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.'" (*People v. Karis* (1988) 46 Cal.3d 612; 638; see also *People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138.) All evidence that tends to prove guilt is damaging to the defendant, but damaging evidence is not excluded unless it meets the more

stringent test of prejudice. (*People v. Karis*, *supra*, 46 Cal.3d at p. 638.)

In evaluating propensity evidence under Evidence Code section 352, "trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other . . . offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 917.) The trial court must determine "whether '[t]he testimony describing defendant's uncharged acts . . . was no stronger and no more inflammatory than the testimony concerning the charged offenses.'" (*People v. Harris* (1998) 60 Cal.App.4th 727, 738.)

"'[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the relative probativeness and prejudice of the evidence in question [citations].'" (*People v. Jablonski*, *supra*, 37 Cal.4th at p. 805.) A trial court's exercise of discretion under Evidence Code section 352 will be overturned only if there was a manifest abuse of discretion; that is, if its decision was palpably arbitrary, capricious, and patently absurd. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.)

C. Analysis

Applying these legal principles, we conclude that the trial court did not abuse its discretion when it admitted evidence of

the May 2001 incident of domestic violence. The incident involved the same victim (Blackmon) with whom defendant was having a romantic relationship. It demonstrated defendant's power over the victim and his propensity to commit acts of violence against her during heated arguments. It also tended to negate the defense theory that Blackmon was the aggressor in their relationship and that defendant did not fire his gun at Blackmon's vehicle. Thus, the trial court reasonably concluded that the prior incident was highly probative of defendant's intent in committing the current offenses.

Furthermore, there was little risk of undue prejudice. Despite defendant's assertion that the evidence of the May 2001 incident was highly inflammatory, it was not significantly more inflammatory than the evidence of the charged offenses. The current offenses involved defendant possessing a deadly weapon, instigating an argument with his girlfriend, and firing multiple shots at her vehicle moments after exiting her vehicle.

And, presentation of the evidence consumed little time and had little risk of misleading the jury. The entire testimony relating to the May 2001 incident was less than 60 pages of reporter's transcript.

Finally, the jury was properly instructed how to consider the evidence of the May 2001 incident. We presume the jury understood and followed the trial court's instructions. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 152.)

D. Harmless error

Even if the trial court had erred in admitting this evidence, which it did not, any error was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) As set forth above, the evidence of defendant's guilt was overwhelming: He instigated an argument by displaying a gun on his lap in Blackmon's

vehicle; he threatened to kill Blackmon when he exited her vehicle; and he fired several shots in her direction moments later. It follows that any error in admitting the May 2001 incident was harmless as a matter of law.

II. The trial court properly admitted evidence of defendant's gang membership

Defendant contends that the trial court abused its discretion by allowing the prosecutor to elicit evidence of his gang membership during cross-examination.

A. Relevant proceedings

As set forth above, Blackmon testified that after the May 2001 incident, she told police that she did not want to identify who hit her because "'his army is faster than your army.'" When asked what Blackmon meant, defense counsel objected and, at side bar, explained that she was concerned that Blackmon was going to say that defendant was in a gang. The trial court instructed the prosecutor not to elicit any gang evidence.

Later, on defendant's direct examination, defendant testified that he could not think of any reason why Blackmon would fear him, his friends, or his family members. With respect to the May 2001 incident, defendant testified that Blackmon had no reason to fear his friends, that none of his friends had any reason to touch her, and that Blackmon had no reason to fear the Douglas apartments area.

Prior to cross-examination, the parties discussed whether the prosecutor could question defendant about his gang membership. The prosecutor emphasized how he "took great pains with [Blackmon] not to go into anything related to gangs" but that based on defendant's testimony, he believed that defendant's gang membership was now highly relevant to impeach his testimony that Blackmon's fear was unfounded. Defense counsel argued that she only questioned defendant about

whether Blackmon feared his friends or the Douglas apartments, neither of which had anything to do with gang membership. The prosecutor responded that the Douglas apartments were the stronghold of defendant's gang, adding: "This is highly relevant to his testimony that he has just given that there's no reason for her to fear the apartments, no reason to fear him or his friends, when there's quite an obvious reason that we tried to avoid because of the court's rulings, but now the defendant has clearly opened the door."

The trial court agreed with the prosecutor and allowed him to question defendant about his gang affiliation. In so ruling, the trial court observed that "there has been an issue raised in regard to the victim's conduct and why she did not report or attempt to contact other individuals in the area, and to suggest that she wasn't fearful." The trial court noted that it was "a legitimate issue . . . that there are gang members throughout the area even in those apartments, and she's been asked specifically if there's any—if there was—she was in fear of his friends or anything."

On cross-examination, the prosecutor asked defendant about his gang membership. He admitted that he used to be a Piru gang member, but claimed that he gave it up in 2002. He confirmed that there were a lot of Piru gang members who hung out at the Douglas apartments.

Later, the prosecutor sought to introduce testimony from a gang expert. The trial court excluded such evidence.

B. Relevant law

A trial court properly admits gang evidence when it is relevant to a material issue at trial. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049; *People v. Martinez* (2003) 113 Cal.App.4th 400, 413.) Gang evidence is not admissible when its only purpose is to prove "'a defendant's criminal disposition or bad character'"

in order to create "'an inference [that] the defendant committed the charged offense.'" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223; see also Evid. Code, § 1101, subd. (a).)

Under Evidence Code section 780, a "jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing." Evidence of a defendant's gang affiliation may be used for impeachment. (See, e.g., *People v. Ayala* (2000) 23 Cal.4th 225, 277; *People v. Ruiz* (1998) 62 Cal.App.4th 234, 241–242.) By taking the stand to testify, a defendant places his own credibility at issue and becomes subject to impeachment in the same manner as any other witness. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1139.)

Even if relevant, gang evidence may be excluded under Evidence Code section 352 if it is more prejudicial than probative. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192.)

We review a trial court's admission of evidence, including gang testimony, for abuse of discretion. "The trial court's ruling will not be disturbed in the absence of a showing it exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice." (*People v. Avitia*, *supra*, 127 Cal.App.4th at p. 193.)

C. Analysis

Applying these legal principles, we conclude that the trial court properly allowed the prosecutor to impeach defendant with evidence of his gang membership. During her 911 call regarding the charged offenses, Blackmon expressed concern about where she would meet the police because defendant had a lot of friends and family members in the neighborhood. Moreover, Blackmon testified that she was afraid to press charges against defendant regarding the May 2001 incident because defendant had a lot of

friends and family members who took matters into their own hands.

Defendant denied that Blackmon had any reason to fear him, his friends, his family members, or the Douglas apartments area.

Given Blackmon's testimony about her fear, and defendant's testimony that Blackmon's fear was unfounded, the trial court did not abuse its discretion in admitting evidence of defendant's gang membership. Evidence that defendant belonged to a gang explained Blackmon's failure to cooperate with police in May 2001 and explained her concerns about meeting with police in 2004.

Moreover, the gang evidence was not more prejudicial than probative and would not have swayed the jury to find defendant guilty regardless of the other evidence presented at trial. (*People v. Hernandez*, *supra*, 33 Cal.4th at p. 1051.) The gang evidence was brief and limited, and merely confirmed defendant's gang membership without providing any specific details of gang activity. No gang expert testified regarding gang culture or habits. Given the important impeachment value of this evidence, the trial court properly admitted the gang evidence.

Relying upon *People v. Morrison* (2011) 199 Cal.App.4th 158, 163, defendant argues that the gang evidence was not relevant because defendant's testimony about Blackmon's fear was not "flatly contradicted" by his gang involvement. But there is no requirement that impeachment testimony "flatly contradict[]" a defendant's claims. Rather, as set forth above, impeachment evidence is relevant when it tends to prove or disprove the truthfulness of a witness's testimony. (Evid. Code, § 780.) And that is exactly what the evidence of defendant's gang membership did here—it had a tendency to disprove defendant's claim that Blackmon had no reason to fear him, his friends, his

family, or the Douglas apartments area. After all, it is common knowledge in Los Angeles that "gangs have proliferated and gang violence is rampant." (*In re H.M.* (2008) 167 Cal.App.4th 136, 146.)

Defendant further argues that the trial court failed to discharge its duty to weigh the evidence under Evidence Code section 352. We disagree. The trial court is presumed to have performed its duty even if it did not expressly so state. (Evid. Code, § 664; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1053 ["a court need not expressly state for the record [that it has engaged] in a weighing process every time it makes a ruling"]; *People v. Padilla* (1995) 11 Cal.4th 891, 924 ["we are willing to infer an implicit weighing by the trial court on the basis of record indications well short of an express statement"], overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

And there is ample evidence that the trial court was weighing the evidence throughout trial. It readily displayed its awareness of Evidence Code section 352 when it admitted evidence of the May 2001 incident. It prohibited the prosecutor's gang expert from testifying. And, originally, the trial court and the parties agreed not to introduce any gang evidence during trial. That only changed after defendant testified and put his credibility at issue by trying to undermine Blackmon's testimony. Under these circumstances, we can infer that the trial court weighed the evidence before allowing it to be introduced.

Finally, defendant argues that reference to his gang membership was unnecessary since Blackmon had already testified that she feared retaliation by defendant's friends and family in 2001. Although Blackmon's testimony contradicted defendant's testimony, eliciting defendant's gang affiliation from defendant contradicted his own testimony, thereby discrediting defendant. (*People v. Burgener* (2003) 29 Cal.4th 833, 869

["Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness's fear is likewise relevant to her credibility and is well within the discretion of the trial court"].)

It follows that we reject defendant's assertion that the trial court violated his due process rights by admitting this evidence.

D. Harmless error

Even if the trial court had erred by allowing the prosecutor to elicit evidence of defendant's gang membership, which it did not, any error was harmless. (*People v. Avitia*, *supra*, 127 Cal.App.4th at p. 194 ["The erroneous admission of gang or other evidence requires reversal only if it is reasonably probable that [the defendant] would have obtained a more favorable result had the evidence been excluded"]; *Chapman*, *supra*, 386 U.S. at p. 24; *Watson*, *supra*, 46 Cal.2d at p. 836.) As set forth above, the evidence of defendant's guilt was compelling. Blackmon's testimony was credible and corroborated by other evidence. For example, her 911 call made shortly after the shooting was consistent with her testimony and showed her fear of defendant and his friends and family.

Defendant contends that the error was prejudicial; in support, he attempts to characterize the trial as a "close case" by referring to the following exchange during defendant's cross-examination:

"[PROSECUTOR]: When did you resign from the gang?

"[DEFENDANT]: I been stopped."

Immediately afterwards a juror asked what defendant meant by the phrase "I been stopped." Because the trial court was also confused, defendant then clarified that he "stopped gang banging in 2002."

Far from indicating that this was a close case, the juror's question merely highlights confusion over defendant's use of the phrase "I been stopped" to mean that he had stopped being a gang member. The juror's question does not suggest that the jury convicted defendant solely because of his gang affiliation.

Nor does the jury's acquittal of defendant of attempted murder demonstrate that this was a "'close case'" and that the jury only convicted him because of the gang evidence. Rather, the jury could simply have determined that the prosecutor did not prove the elements of attempted murder, but did prove the elements of assault and shooting at an occupied motor vehicle.

III. The matter is remanded for reconsideration of defendant's sentence as to the firearm enhancement under Senate Bill No. 620

Defendant asserts that the matter should be remanded for resentencing on the firearm enhancement imposed under section 12022.5, subdivision (a), pursuant to Senate Bill No. 620 (2017-2018 Reg. Sess.).

At the time of defendant's sentencing, trial courts had no authority to strike firearm enhancements proven under sections 12022.5 and 12022.53. But, Senate Bill No. 620, which became effective January 1, 2018, removed the prohibition; sections 12022.5 and 12022.53 now give trial courts the discretion to strike an enhancement. And, as the parties agree, the amended statutes apply retroactively. We therefore remand the matter to the trial court to consider whether to strike the firearm enhancements pursuant to the discretion now conferred by Senate Bill No. 620.

In urging us to reject this argument, the People argue that remand is unnecessary because the appellate record "clearly indicates [that] the trial court would not have exercised any

discretion to strike the firearm enhancement" if it had known it had the discretion to do so. We disagree.

"'[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to "sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court," and a court that is unaware of its discretionary authority cannot exercise its informed discretion.'" (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Therefore, "unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so," remand is required. (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110.)

The record of the sentencing hearing in this case contains no "clear indication" that if the trial court knew it had discretion with regard to imposition of the firearm enhancement it still would have imposed it. Merely opting for the upper term of 10 years is insufficient. For that reason, as pointed out by defendant in his reply brief, *People v. McVey* (2018) 24 Cal.App.5th 405, 418–419 (*McVey*), is distinguishable. In *McVey*, not only did the trial court sentence the defendant to the "highest possible term for the firearm enhancement," but in doing so, it also identified several aggravating factors, including the lack of significant provocation, the defendant's disposition for violence, the defendant's lack of remorse, and the defendant's "'callous reaction'" after shooting an unarmed homeless man six or seven times. (*McVey*, *supra*, at p. 419.) Here, in contrast, the trial court did not identify any factors in aggravation. Thus, the matter must be remanded for resentencing. (*People v. Almanza*,

supra, 24 Cal.App.5th at p. 1110; *People v. McDaniels*, *supra*, 22 Cal.App.5th at p. 425.)

DISPOSITION

The matter is remanded for resentencing pursuant to section 12022.5, subdivision (a), pursuant to Senate Bill No. 620. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ